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November 20, 1997

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BY HAND DELIVERY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, Room 222  
Washington, D.C. 20554

Re: In the Matter of Implementation of the Pay  
Telephone Reclassification and Compensation  
Provisions of the Telecommunications Act of  
1996, CC Docket No. 96-128

Dear Mr. Caton:

Please find enclosed for filing an original and four copies  
of the Opposition of the RBOC/GTE/SNET Coalition to MCI's Motion  
for a Stay in the above captioned proceeding.

Please date-stamp and return the extra copy provided to the  
individual delivering this package.

Sincerely,

*Michael Kellogg*

Michael K. Kellogg

Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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In the Matter of )  
 )  
Implementation of the Pay Telephone )  
Reclassification and Compensation ) CC Docket 96-128  
Provisions of the Telecommunications )  
Act of 1996 )

**OPPOSITION OF THE  
RBOC/GTE/SNET COALITION TO  
MCI'S MOTION FOR A STAY**

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The RBOC/GTE/SNET Payphone Coalition hereby opposes MCI's motion for a stay pending judicial review of the Commission's Second Report and Order in this proceeding.

MCI has utterly failed to satisfy the standard requirements for a stay. MCI makes no plausible claim of irreparable harm; indeed, it appears to concede that any economic losses it suffers can be remedied by the Commission if the Second Report and Order is eventually overturned. MCI Motion at 16 n.8. At the same time, MCI cavalierly ignores the substantial harm that PSPs would suffer from any continued failure by interexchange carriers ("IXCs") to pay per-call compensation. Effective April 15, 1997, Coalition PSPs removed all cross-subsidies: payphone operations must now be self-supporting. Congress accordingly mandated that PSPs receive compensation on all calls made from their payphones. Yet, despite that clear command, PSPs have been deprived of compensation on the overwhelming majority of access code and subscriber 800 calls; MCI and other IXCs have openly flouted the Commission's orders and refused to pay PSPs compensation that they are owed, despite significant reductions in the carrier common line charges paid by those IXCs. And MCI, for one, has not even shared the

benefits of its noncompliance with its customers: MCI has long since hiked subscriber 800 rates and has added a \$.35 surcharge to all access code calls made from a payphone.

MCI's attack on the Second Report and Order is wholly without merit. The Commission adhered scrupulously to the D.C. Circuit's mandate on remand. MCI's ipse dixit notwithstanding, the D.C. Circuit never criticized the Commission's decision to use the local coin rate as the starting point in its analysis, and it credited the Commission's finding that the local coin rate was competitive. The court's sole criticism was that the Commission had failed to account for cost differences between coin calls on the one hand and access code and subscriber 800 calls on the other. This is precisely what the Commission has now done.

MCI's stay request does not warrant serious consideration by the Commission. But, then, it is clear that MCI does not want such consideration. The Second Report and Order was issued over a month ago. Only now does MCI seek a stay of that Order; and, at the same time, it informs the Commission that the matter is so urgent that, if the Commission has not acted by November 24 (seven working days after the motion was filed, and two working days after this opposition is due), MCI will file for relief directly in the D.C. Circuit. See MCI Motion for Stay, at 3 n.1. MCI apparently intends to prevent the parties and the Commission from having an adequate opportunity to respond to the farrago of misrepresentations and untenable arguments contained in its Motion.<sup>1</sup>

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<sup>1</sup>Under FCC rules, oppositions to a request for stay must be filed within seven days of the filing of the request. 47 C.F.R. § 1.45(d). MCI filed its motion on Thursday, November 13, and represented in its certificate of service that it had served parties by mail on that same day. In fact, MCI's own internal postage meter stamp reveals that MCI did not mail its pleading until Friday, November 14. As a result, the parties did not learn of the Motion until Monday, November 17, leaving them with only three days in which to respond.

**I. MCI HAS MADE NO PLAUSIBLE CLAIM OF IRREPARABLE HARM TO JUSTIFY A STAY**

The Commission must consider four factors to determine whether MCI has justified a stay:

1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; 2) the likelihood that the moving party will be irreparably harmed absent a stay; 3) the prospect that others will be harmed if the court grants the stay; and 4) the public interest in granting the stay.

Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985). Although none of these factors favors the granting of a stay in this case, it is particularly clear that MCI is threatened with no irreparable harm justifying a stay. Here, as in many cases, "analysis of the second factor disposes of [MCI's] motion." *Id.* at 674.

MCI's sole claim of threatened injury — itself dubious as we shall see — is that "MCI will realize an unquantifiable but significant reduction in revenue." MCI Motion for Stay, at 13. But "[i]t is well settled that economic loss does not, in and of itself, constitute irreparable harm."

Wisconsin Gas Co., 758 F.2d at 674. As the D.C. Circuit has noted:

Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm.

Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). MCI's claimed injury is of precisely this type: MCI itself concedes that if it finally complies with its legal obligation to pay per-call compensation, and in the unlikely event the amount of that per-call

compensation is reduced on appeal,<sup>2</sup> it will seek recovery of overcharges. See MCI Motion for Stay, at 16 n.8. In other words, the only threatened harm to MCI is that it will lose money that can later be restored. But "[r]ecoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." Wisconsin Gas Co., 758 F.2d at 674. Needless to say, MCI makes no claim that its business is threatened here.

These principles should sound familiar to MCI: on the same day it filed its Motion for Stay, it also filed an Opposition to a Conditional Motion for Stay of the Price Cap Order<sup>3</sup> in the D.C. Circuit. MCI quoted extensively from Wisconsin Gas and relied heavily on the proposition that compensable economic harms do not justify relief. See MCI's Opposition to the Local Exchange Carrier Motion for a Stay and Alternative Motion to Sever MCI's Appeal, at 3-4 (filed Nov. 13, 1997) (attached as an exhibit to this Opposition). A foolish consistency may be the hobgoblin of small minds, but taking inconsistent positions in two pleadings filed the same day carries broadmindedness too far.

MCI's claim is all the more spurious because it offers no evidence that it will suffer economic harm as a result of the need to pay per-call compensation at the rate established by the Commission. MCI claims, without foundation, that if per-call compensation is a few pennies too high, "many customers will inevitably choose" to block such calls. But this is no more than an

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<sup>2</sup>MCI concedes that PSPs are entitled to "substantial compensation" for access code and subscriber 800 calls. See MCI Motion for Stay, at 9. The only question at issue, then, is the amount of that compensation. The Coalition believes that the per-call amount is too low and that it will be raised, not lowered, on reconsideration or, if necessary, on appeal.

<sup>3</sup>Fourth Report and Order, Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, and Second Report and Order, Access Charge Reform, CC Docket No. 96-262 (rel. May 21, 1997) and errata (rel. June 6, 1997).

"unsubstantiated and speculative allegation," Wisconsin Gas Co., 758 F.2d at 674; despite the fact that MCI has been passing per-call compensation charges along to its customers for months — at the \$.35 rate — it has presented no evidence to the Commission that customers have sought to block calls or even that it has lost a single 800-service subscriber.<sup>4</sup>

Moreover, even if MCI could show that it had suffered a business loss due to its practice of charging customers for per-call compensation charges (that it does not itself pay), MCI never explains how the stay would address such harm. Given that the Commission's Order is likely to be substantially upheld on review, and given that MCI itself concedes it owes PSPs "substantial compensation," see MCI Motion for Stay, at 9, MCI will be forced to continue to collect such compensation from its customers as if the charge were in place -- just as it has done up to now. MCI cannot wait until the Order is affirmed to collect payments. In other words, because the stay will not affect MCI's ultimate liability, MCI will be forced to proceed as if the stay were absent -- except that it would have the FCC's blessing on its intransigent refusal to pay to PSPs the per-call charges that are due and owing.

## **II. A STAY WOULD CAUSE SEVERE HARM TO PAYPHONE SERVICE PROVIDERS AND HENCE TO THE PUBLIC INTEREST**

The utter absence of any plausible claim of irreparable harm is in and of itself sufficient reason to deny MCI's requested relief. But even brief consideration of the harm that a stay would cause PSPs and the public interest as defined by Congress further confirms that the equities weigh heavily against MCI's claim.

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<sup>4</sup>Indeed, MCI has been collecting per-call compensation from its customers even as it has maintained that it need not pay such compensation to PSPs. MCI is thus happily victimizing the very customers it purports to be concerned about here.

Even before the D.C. Circuit's remand order, MCI and other IXCs openly flouted the Commission's orders and refused to pay PSPs the compensation that they were owed. They refused to pay even after accepting the benefits of the reduced carrier common line charge that resulted from the very same orders. They refused to pay even after raising their rates to customers for the stated purpose of being able to pay. And they refused to pay even after denouncing the Commission's orders, and blaming price hikes on the Commission, before the public and the press. See Coalition Reply Comments on Remand, at 37-38 (filed Sept. 9, 1997).

This refusal to pay compensation threatens serious harm to PSPs. Pursuant to the Commission's orders, as of April 15, 1997, LECs eliminated hundreds of millions of dollars in subsidies (state and federal) formerly used to support their payphones. The LECs did so with the express understanding that they would be compensated for "each and every" completed call made using their phones. Indeed, the statute commands no less. 47 U.S.C. § 276(b)(1)(A). Yet only a tiny fraction of compensation due has been paid.

This threat to the health of PSPs is likewise a threat to "the widespread deployment of payphone services." 47 U.S.C. § 276(b)(1). Because Congress explicitly declared its intention to promote such widespread deployment, MCI's disobedience of binding FCC orders constitutes a direct threat to the public interest. The notion that this attack on the public interest should be validated by a Commission stay is particularly outrageous. The Commission should not only deny MCI's stay, it should quickly require MCI and other IXCs to pay PSPs the hundreds of millions of dollars in interim compensation that are rightly due under the statute. Any other course threatens irreparable harm to PSPs, and significant harm to the public interest.

### **III. MCI'S CHALLENGE TO THE ORDER WILL CLEARLY FAIL ON THE MERITS**

Of the numerous challenges to the Commission's per-call compensation rate that MCI and other IXC's raised on appeal before the D.C. Circuit, the Court rejected all but one. The Court, for instance, rejected the IXC's argument that it was wrong to link per-call compensation to the local coin rate, because that rate would be inflated by monopolistic pricing. See Illinois Public Telecommunications Ass'n v. FCC, 117 F.3d 555, 562 (D.C. Cir. 1997). Likewise, the Court declined to credit the IXC's claim that the FCC had failed to justify its rejection of TELRIC and other cost-based methodologies. Nor did the Court find fault with the FCC's decision to set a "default rate" using a "market surrogate."

The Court only disagreed with the Commission's rationale for the market surrogate that the Commission selected. In particular, the Court read the Commission's order as providing only "one ground" for linking the per-call compensation rate for subscriber 800 and access code calls to the price of local coin calls — "that the costs" of those calls "all are similar." Id. at 563. The Court went on to point out that the record contained evidence indicating that the costs in fact were not similar, and that the Commission had failed to address that evidence. Id. at 563-64.

On remand, the Commission addressed the flaw in its original methodology. It sought comment on "differences in costs to the PSP of originating subscriber 800 calls and access code calls, on the one hand, and local coin calls, on the other hand," as well as the extent to which the difference, if any, should "affect a market-based compensation amount." Public Notice, Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding, DA 97-1673, at 2 (Aug. 5, 1997).

In its Second Report and Order, the Commission set a market-based rate for access code and subscriber 800 calls by adjusting the local coin rate for cost differences between local coin and coinless calls.<sup>5</sup> This avoided cost methodology is a well established way of setting prices that mirror market results. See, e.g., Coalition Comments on Remand, Hausman Decl. at 7 (Aug. 26, 1997). The subtraction of avoided costs from a market rate is not a "subtraction of apples from oranges," MCI Motion at 7, but an accepted regulatory technique for adjusting prices to reflect differences in costs, one that ensures that "each call placed at a payphone . . . bear[s] an equal share of joint and common costs." Second Report and Order ¶ 42. Indeed, Congress has itself adopted a similar methodology in establishing pricing standards for resale of local telecommunications services. See 47 U.S.C. § 252(d)(3).

By adjusting for costs avoided, and incurred, when a payphone is used for dial-around and subscriber 800 calls, this approach ensures that the payphone provider is indifferent to whether the consumer makes a subscriber 800 call, a dial-around long distance call, or a coin call: in each case there is the same "profit," and the same contribution to joint and common costs, regardless of call type. MCI's suggestion that the Commission failed to reduce "profits" commensurately with costs proves nothing but MCI's own failure to read and understand the Commission's order. Cost figures include, where appropriate, return on investment, what MCI refers to colloquially as "profit." See, e.g., Second Report and Order at ¶ 53 & n.139. The

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<sup>5</sup>Contrary to MCI's suggestion, the Commission has addressed at length, in its original Order, its Order on Reconsideration, and yet again in its Second Report and Order, the benefits of a market-based approach and its reason for relying on the local coin rate as the starting point for its calculation of a market surrogate. See Report and Order ¶¶ 67-73; Order on Reconsideration ¶¶ 50, 66-71; Second Report and Order ¶¶ 23-28, 42, 44.

avoided cost methodology thus ensures that because all calls bear an equal share of joint and common costs, they also return an equal share of return on those costs.<sup>6</sup>

In short, the FCC's methodology on remand responded directly to the D.C. Circuit's sole criticism of the Commission's decision to set per-call compensation equal to the local coin rate: that the Commission had failed to account for record evidence of differences in costs between coin and coinless calls. MCI gives no reason to believe that the FCC's analysis of those differences in the Second Report and Order was in any way faulty. Indeed, the irony of MCI's attack is that, to the extent that the Commission erred in its Second Report and Order, those errors favor MCI. Had the Commission applied the inverse demand pricing methodology documented by the Coalition, it would have discovered that the local coin rate is not too high, but too low. Had it properly evaluated the evidence according to its own criteria, it would have seen that coin mechanism costs are not avoidable. Had it properly applied the avoided cost methodology, it would have discovered that it overstated avoidable coin mechanism costs, and

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<sup>6</sup>MCI attempts to illustrate its "superprofit" argument by relying on a New England Telephone cost study. See MCI Motion at 8 n.2. But the Commission expressly and properly declined to rely on that study, which looked only at incremental costs for a single, non-representative PSP. See Second Report and Order ¶ 70, 110. See also Coalition Reply Comments on Remand at 27. The cost study's failure to include any joint and common costs makes it impossible to determine whether the PSP is making any profit at all, much less a superprofit. Moreover, MCI's 281% profit number does not just mix apples and oranges, it makes a whole fruit salad: it subtracts the Commission's number for per-call avoided costs from one state's unrepresentative incremental cost number, and then compares this to a market-based compensation rate. Indeed, MCI actually argues that in a market with no barriers to entry — payphone service — profit margins on local coin calls are running at 210%. Presumably, only the oligopoly profits it earns in the long-distance markets keep MCI from getting into payphones in a bigger way.


understated the adjustment for avoidable ANI ii costs.<sup>7</sup> Had it properly treated the data submitted by the parties, it would have made less of a subtraction for line savings, and an upward adjustment for PSPs' bad debt and collection costs.

In sum, MCI's challenge to the Commission's Second Report and Order, on the merits, has no realistic possibility of success.

### CONCLUSION

For the foregoing reasons, the Commission should deny MCI's request for a stay pending judicial review.

Respectfully submitted,



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<sup>7</sup>MCI's own evidentiary challenge to the ANI ii cost data is based on information that was not even in the record before the Commission. See MCI Motion for Stay, at 13 (citing USTA letter dated October 24, 1997). Thus, although the USTA letter could be a basis for a reconsideration motion, it would not be cognizable in MCI's appeal.



**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**UNITED STATES TELEPHONE  
ASSOCIATION, et al.,**

**Petitioners,**

**v.**

**FEDERAL COMMUNICATIONS  
COMMISSION and UNITED STATES  
OF AMERICA,**

**Respondents.**

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**Nos. 97-1469 and  
consolidated cases**

**MCI'S OPPOSITION TO THE LOCAL EXCHANGE  
CARRIER MOTION FOR A STAY AND ALTERNATIVE  
MOTION TO SEVER MCI'S APPEAL**

Petitioner MCI Telecommunications Corporation ("MCI") respectfully  
opposes the conditional motions of certain local exchange carriers ("LECs") to stay the  
"continued effectiveness" of the *Price Cap Order*<sup>1</sup> challenged in these proceedings.<sup>2</sup> MCI

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<sup>1</sup>*In the Matter of Price Cap Performance Review for Local Exchange Carriers*, Fourth Report and Order, CC Docket No. 94-1; Second Report and Order, CC Docket No. 96-262, 1997 FCC LEXIS 2725 (rel. May 21, 1997). On June 18, 1997, the FCC released an order denying a stay of the *Price Cap Order* that had been requested by Pacific Bell, Nevada Bell, and Southwestern Bell. *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd. 10175 (1997) ("FCC Stay Order").

<sup>2</sup>Memorandum in Opposition to AT&T's Late-Filed Motion to Hold in Abeyance and Conditional Motion for a Stay (filed Nov. 3, 1997) ("*LEC Motion*"). The LECs ask this Court to enter a "stay" of the *Price Cap Order* only in the event that the Court grant's AT&T's motion to hold this appeal in abeyance pending the FCC's ruling on pending petitions for reconsideration. *LEC Motion*, at 10.

also opposes the LECs' alternative request that this Court sever MCI's petition for review from these consolidated proceedings.<sup>3</sup>

**I. THE LECs HAVE NOT JUSTIFIED A "STAY" OF AGENCY RULES THAT HAVE BEEN IN EFFECT MORE THAN SIX MONTHS**

A stay pending review "is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit." Washington Metro. Transit Comm'n v. Holiday Tours, 559 F.2d 841, 844 (D.C. Cir. 1977). Here, movants' request for a "stay" would work exactly the opposite result: it would massively *change* the status quo. The FCC order challenged in these proceedings issued in May 1997, and required LECs to lower access charges by July of this year.<sup>4</sup> As a direct result, consumers today enjoy substantially lower long-distance prices.<sup>5</sup> Movants' requested "stay" would dramatically alter the status quo by requiring the FCC to rescind those lower access charges and the resulting lower long-distance rates.

Where the preliminary relief requested "is mandatory -- that is, where its terms would alter, rather than preserve, the status quo by commanding some positive act . . . the moving party must meet a higher standard than in the ordinary case by

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<sup>3</sup>See *LEC Motion*, at 9 n. 16.

<sup>4</sup>See *LEC Motion*, at 7 (citing *Price Cap Order* ¶¶ 191, 197).

<sup>5</sup>See "AT&T Keeps Promise After All: Will Pass Access Charge Savings to Customers," *Communications Daily*, July 1, 1997, at 3; "Long-Distance Rates Cut for First Time Since '92," *Wall Street Journal*, July 1, 1997, at B4; "AT&T Long-Distance Rates Cut and MCI Joins in Move," *The New York Times*, July 1, 1997, at D2.

showing 'clearly' that he or she is entitled to relief or that 'extreme or very serious damage' will result from a denial of the injunction." Phillips v. NCAA, 118 F.3d 131, 133 (2d Cir. 1997); *see also* Malkentzos v. DeBuono, 102 F.3d 50, 54 (2d Cir. 1996) (same); Alaska Excursion Cruises, Inc. v. United States, 595 F. Supp. 14, 18 (D.D.C. 1984) ("where, as here, issuance of a preliminary injunction would alter the status quo rather than preserve it, the Court must be reluctant to simply shift economic burdens from one party to another. A showing that 'the facts and law clearly support the moving party' is necessary to justify such intrusive relief") (citations omitted).

Movants have not satisfied these stringent standards. As explained below, their claimed damages pending appeal are solely financial consequences that can easily be remedied if this Court's decision on the merits so requires. Moreover, movants have not demonstrated *any* entitlement to relief. Accordingly, movants have simply not demonstrated "that exercise of the court's extraordinary injunctive powers is warranted." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985).

**A. MOVANTS HAVE FAILED TO SHOW ANY DANGER OF IRREPARABLE INJURY.**

Preliminary injunctive relief is warranted only "to prevent irreparable harm." Wisconsin Gas v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). The "injury must be both certain and great; it must be actual and not theoretical." *Id.* Of key importance here, "economic loss does not, in itself, constitute irreparable injury . . . . The possibility that adequate compensatory or other corrective relief will be available at

a later date . . . weighs heavily against a claim of irreparable harm." *Id.*, citing Virginia Petroleum Jobbers Ass'n v. EPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Thus, "[r]ecoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." Wisconsin Gas v. FERC, 758 F.2d at 674.

Movants identify only one harm -- reduced access charge revenues -- that they will suffer pending a decision on the merits of this appeal. But the Commission squarely found it could remedy any financial losses movants might suffer *pendente lite*:

Any such losses, moreover, would be recoverable if the Commission's decision should be overturned on review. The petitioners acknowledge that the Commission has "substantial latitude" to adjust future rates to make up for any losses where the Commission's decision occasioning those losses is reversed on appeal. The parties seeking a stay argue, however, that adjustments to future rates will not work in this case because competition will make it "unlikely" that the telephone companies will be able to raise their rates in the future to recoup any losses. But the incumbent telephone companies almost certainly will not face substantial competition for all services in all geographic areas in the near future and thus will be able to take full advantage of any Commission order permitting them to make up for lost revenues. And, as AT&T points out, even SWB's own declarant has not supported the claim that competitive pressures make it "unlikely" that rates could be raised, asserting only that recoupment is "uncertain." In these circumstances, we find that any decreases in access revenues, even if they were certain and substantial, would not be irreparable and thus do not justify a stay.

*FCC Stay Order* ¶ 32 (footnotes omitted). Movants offer nothing even suggesting the Commission was incorrect in finding that any financial harms at issue here are fully reparable.<sup>6</sup>

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<sup>6</sup>Movants claim local competition might prevent their recovering compensatory access charge increases if the Commission were to order them after this Court's decision

Indeed, movants' conduct soundly belies their claimed fear of irreparable injury. The FCC issued the challenged *Price Cap Order* in June of this year. A few of the movants in this Court asked the Commission for a stay, which was promptly denied on June 18, 1997. *FCC Stay Order*, at 1. All the movants then sat idly by while the *Price Cap Order* went into effect on July 1. Movants did not ask this Court for a stay until November 3, 1997, more than six months after the Commission released the challenged order, and more than five months after the challenged rules took effect.

"Delay of this nature undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984), citing *Le Sportsac, Inc. v. Dockside Research, Inc.*, 478 F. Supp. 602, 609 (S.D.N.Y. 1979); see also *Citibank, N.A. v. Cititrust*, 756 F.2d 273, 276 (2d Cir. 1985) ("delay alone may justify denial of a preliminary injunction. . ."). If movants truly believed there was a serious risk of irreparable injury here, they would have asked this Court for a stay in a timely fashion, prior to the time when the *Price Cap Order* took effect. Movants' failure

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on the merits. *LEC Motion*, at 8. This argument fails for at least two reasons. First, as the Commission observed, local competition is not developing quickly enough to threaten the LECs' ability to recover such access charges if necessary. *FCC Stay Order*, ¶ 32. Moreover, the LECs' argument makes no sense as an economic matter. If the LECs' access charges (as modified by the Commission order challenged here) are above cost-justified levels, then LECs have no proper basis for complaining about them. If the LECs' access charges are *below* cost-justified levels, no rational company would attempt to compete in the access market. Thus, if the LECs have any legitimate complaint about their current access charge levels, they are extremely unlikely to face competition that would prevent future rate adjustments to compensate for any under-recovery this Court might find.

to do so confirms the Commission's conclusion that the financial harms at issue here are fully reparable should the need arise.

**B. MOVANTS' SUBSTANTIVE ARGUMENTS HAVE NO HOPE OF SUCCESS ON THE MERITS.**

Movants have also failed to show any likelihood of success on the merits (much less the "clear entitlement" required to justify an injunction that modifies the status quo).<sup>7</sup> Many of the substantive arguments presented by movants are procedurally improper in that they were not presented to the Commission in the rulemaking process or in connection with the FCC stay request. In any event, movants' arguments are meritless.

**1. Movants' Claim that the Price Cap Order Resulted from a Political Deal is Procedurally Flawed and Substantively Meritless.**

Movants' principal argument is that the *Price Cap Order* was the result of "political compromise, not reasoned agency decisionmaking."<sup>8</sup> Movants ask this Court, based on a collection of press clippings, to conclude that the *Price Cap Order* was not really adopted for the reasons articulated by the Commission. Instead, movants ask this Court to conclude that the Commission reached a "deal" with AT&T to reduce access charges and then attempted to disguise that deal through a sham recitation in the *Price Cap Order* of the purported bases for the decision. *Id.*

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<sup>7</sup>See pages 2-3, *supra*.

<sup>8</sup>*LEC Motion*, at 11-13.

Movants' argument is meritless for several reasons. First, there is no legitimate basis to disregard the Commission's stated reasons for its actions. The *Price Cap Order* explains in great detail the careful deliberations and reasoning that led the Commission to adopt a 6.5 percent X-Factor. "Under well-settled principles, a Commission order 'must stand or fall on the grounds articulated by the agency' in that order." Laclede Gas Co. v. FERC, 997 F.2d 936, 944 (D.C. Cir. 1993); Algonquin Gas Transmission Co. v. FERC, 948 F.2d 1305, 1312 n.12 (D.C. Cir. 1991). Even if in theory a petition could properly ask this Court to find that the agency's stated reasons for an action were inaccurate and fraudulent, it surely would take more than the news clippings and innuendo presented by movants here.<sup>9</sup> The *Price Cap Order*, just like any other administrative order, should be reviewed in this Court on the basis of the reasons articulated by the Commission.

Movants' argument is also procedurally improper because it was never presented to the Commission as a basis for altering the *Price Cap Order*.<sup>10</sup> The

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<sup>9</sup>Even if this Court were willing to credit news clippings in this proceeding, those cited by movants, taken as a whole, suggest little more than that FCC Chairman Hundt sought an agreement from AT&T that any access reductions the FCC did order would be passed through to AT&T's customers. See, e.g., "AT&T Offers Long-Distance Rate-Cut Plan; Deal with Regulators to Benefit Consumers," *The Washington Post*, May 4, 1997, at A1. This does not mean, however, that the Commission failed to base its decision about how *much* to reduce those charges on the record as explained in its *Price Cap Order*. Indeed, it would seem entirely salutary for the Commission to ensure that any access reductions it ordered would benefit consumers.

<sup>10</sup>Movants argue that the "deal" was announced only four days prior to the Commission's adoption of the *Price Cap Order* and thus, no party could have challenged it in the normal notice and comment leading to that agency action. Movants' proper recourse was to challenge any perceived political "deal" on petitions for reconsideration.

Communications Act generally prohibits a party from relying in this Court on "questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." 47 U.S.C. § 405. Section 405 thus requires "complainants, before coming to court, to give the FCC a 'fair opportunity' to pass on a legal or factual argument." City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1163 (D.C. Cir. 1987), *citing* Washington Ass'n for Television & Children v. FCC, 712 F.2d 677, 681 (D.C. Cir. 1983). This exhaustion doctrine should apply here with special force. It would be entirely unfair to both this Court and to the Commission to attempt judicial review of a claimed "political deal" by the FCC without first giving that agency an opportunity to rule in the first instance on such an inflammatory charge.

Moreover, the movants who sought a stay of the *Price Cap Order* from the Commission did not rely in that proceeding on the purported "political deal" between the Commission and AT&T.<sup>11</sup> Movants' effort to present this new argument in support of a stay to this Court plainly violates the rule that stay requests "must ordinarily be made in the first instance" to the agency that issued the order. Fed. R. App. P. 18; *see* Washington Metro. Transit Comm'n, 559 F.2d at 844. This requirement would be meaningless if the movants failed to allow the agency to rule "in the first instance" on the

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However, no such challenge was presented. In any event, the petitions for reconsideration are still pending before the Commission, so even if this issue *had* been raised on reconsideration (which it was not) it would not properly be before this Court at this time.

<sup>11</sup>See *FCC Stay Order* ¶¶ 14-26 (summarizing the arguments for likelihood of success on the merits presented by movants before the FCC).

same theories and arguments used to support a stay motion in the Court of Appeals.

2. *Movants' Other Complaints About the FCC's Reasoning Are Equally Meritless*

Movants argue that the Commission erred in failing to give weight to the United States Telephone Association's ("USTA's") estimates of the X-Factor used to measure LEC productivity growth.<sup>12</sup> This argument also should not be considered because movants failed to present it in connection with the stay request to the FCC.<sup>13</sup> In any event, movants' claim offers no hope of success on the merits.

The record before the FCC included three models (Ad Hoc Telecommunications Association, AT&T and USTA) for calculating the proper X-Factor.<sup>14</sup> The Commission engaged in an exhaustive review of each step of the methodology used by these models, selecting the best approach to each step from among the three.<sup>15</sup> The Commission then presented its own X-Factor computations, which synthesized the best features of all three models to produce the "best methods and data

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<sup>12</sup>*LEC Motion* at 14-15.

<sup>13</sup>*See* note 11 above and accompanying text.

<sup>14</sup>MCI offers this explanation of the Commission's stated reasoning simply to demonstrate the fallacy of movants' claim that the FCC arbitrarily disregarded USTA's X-Factor estimates. MCI does not necessarily endorse each step of the Commission's reasoning. Indeed, MCI plans to challenge certain aspects of the Commission's reasoning and calculations in producing the X-Factor it ultimately chose. Unlike movants, however, MCI believes the Commission's errors produced an X-Factor that was too low (movants argue that it was set too high).

<sup>15</sup>*Price Cap Order*, at ¶¶ 16-137.

available in the record of this proceeding."<sup>16</sup>

The Commission then turned to an examination of the X-Factor estimates that resulted from these computations. The Commission found the Ad Hoc and USTA estimates so flawed as to be entitled to no weight.<sup>17</sup> This was true as to USTA because its model had not provided "any reliable estimate of the input price differential," one of two key inputs to the X-Factor calculation.<sup>18</sup> The Commission found that AT&T model worthy of only "some weight" because it was based on "methods that do not provide the best estimates of productivity from this record."<sup>19</sup> Accordingly, the Commission decided to "rely primarily on our own analysis, which is a synthesis of the most persuasive treatment . . . suggested by the record."<sup>20</sup>

Finally, having decided which X-Factor estimates to credit, the Commission looked to the range of X-Factor estimates for each year from 1986 through

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<sup>16</sup>*Id.* at ¶ 137.

<sup>17</sup>With respect to the Ad Hoc model, *see Price Cap Order* at ¶¶ 38, 137.

<sup>18</sup>*Price Cap Order*, at ¶ 137. Earlier in the decision, the Commission had explained the necessity of including an input price differential in the X-Factor calculation: "changes in a firm's costs of producing a unit of output are the product of both changes in the quantity of resources used, *i.e.*, changes in productivity, and changes in the prices paid for those resources, *i.e.*, changes in input prices . . . . [A]s a theoretical matter, because LEC unit costs are also affected by the prices they pay for inputs, an input price differential should be included in the X-Factor." *Id.* at ¶ 95. The Commission went on to explain in detail why USTA's claim that there should be no input price differential was incorrect and fatal to USTA's X-Factor computations. *Id.* at ¶¶ 95-106.

<sup>19</sup>*Id.* at ¶ 137.

<sup>20</sup>*Id.*

1995. It also examined the average calculated X-Factors for the periods 1986-1995, 1987-1995, 1988-1995, 1989-1995, 1990-1995 and 1991-1995.<sup>21</sup> Based on *all* of this information, the Commission determined that a "reasonable, challenging productivity" component of the X-Factor would lie within a range between 5.2 percent and 6.3 percent.<sup>22</sup> The Commission then determined that the X-Factor should be set at the upper end of this range.<sup>23</sup> Accordingly, the Commission selected 6.0 percent as the appropriate productivity component of the X-Factor.

Movants' claim that the FCC "arbitrarily refused to attach weight to a productivity study submitted" by USTA is thus incorrect.<sup>24</sup> The Commission carefully considered USTA's methodology, and adopted certain components of USTA's methodology as the most appropriate found in the record. The Commission did decline to credit USTA's overall X-Factor estimates, but its action in doing so was hardly "arbitrary." It was based on the Commission's finding that USTA failed to provide a reliable measure of input price differentials. The Commission fully explained why this

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<sup>21</sup>*Id.*, at ¶ 138

<sup>22</sup>The 5.2 percent figure matches the Staff estimate of the average productivity component for the period 1986-1995 and for the period 1991-1995. The 6.3 percent matches AT&T's estimate of the productivity component for the period 1991-1995.

<sup>23</sup>The Commission's reasons for this choice were fully explained: (a) over time the LECS have consistently achieved productivity growth near or above the upper end of the range identified by the Commission; (b) there appears to be a strong upward trend in productivity growth from 1992 to 1995; and (c) AT&T's estimates of total company productivity were above the upper limit of the Commission's range. *Price Cap Order*, at ¶ 141.

<sup>24</sup>*LEC Motion*, at 14.

factor was of crucial importance and why USTA's methodology on this point was flawed.<sup>25</sup> There was nothing "arbitrary" about it.

Nor was there anything "unequal" about the Commission's treatment of the USTA and AT&T X-Factor estimates.<sup>26</sup> The Commission gave each of these models the weight it concluded appropriate. Finding the USTA model fatally flawed, the Commission gave those estimates no weight. Finding the AT&T model better but still flawed, the Commission accorded it "some" weight. The precise reasoning for these conclusions was explained in great detail in the Commission's discussion of each step in the X-Factor.

There is also no merit in movants' claim that the Commission "arbitrarily decided to discard" the two lowest averages of X-Factor estimates (both at 5.2%).<sup>27</sup> The Commission did not "discard" or "disregard" these averages, as claimed by movants; it decided to "place less weight on them" for reasons that the Commission explained in great detail.<sup>28</sup> Indeed, the end result of the Commission's work was the conclusion that "a reasonable challenging productivity offset for incumbent LECs lies within a range whose lower bound is 5.2 percent."<sup>29</sup> Far from disregarding these estimates, therefore, the Commission adopted them as the lower bound of the range of reasonable X-Factors.

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<sup>25</sup>See note 18 *supra* and accompanying text.

<sup>26</sup>See *LEC Motion*, at 15.

<sup>27</sup>*LEC Motion*, at 16.

<sup>28</sup>*Price Cap Order*, at ¶ 139.

<sup>29</sup>*Id.* at ¶ 140.

Finally, movants are incorrect that the FCC failed to explain its adding a "Consumer Productivity Dividend" ("CPD") of 0.5 percent to produce a final X-Factor of 6.5 percent. From the very beginning of price cap regulation, the Commission has included an 0.5 percent Consumer Productivity Dividend in order to "assign the first price cap productivity gains to customers in the form of lower rates."<sup>30</sup> In the *Price Cap Order* challenged here, the Commission simply rejected proposals that the CPD be eliminated.

The Commission articulated several reasons for continuing the CPD. First, it found a continued need to "require incumbent LECs to transfer some portion of their unit cost reductions to their customers."<sup>31</sup> Moreover, the Commission expressed a continuing desire to encourage LEC productivity gains, especially in light of the increased potential for productivity expected from other regulatory actions taken by the Commission.<sup>32</sup> Also, because the CPD is simply a mechanism for sharing achievable productivity gains with consumers, the Commission necessarily justified its level in providing a lengthy explanation why the overall 6.5 percent X-Factor was a realistic overall productivity target.<sup>33</sup>

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<sup>30</sup>Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786, 6796 (¶ 76) (1990) [*"LEC Price Cap Order"*], Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), modified, 6 FCC Rcd 2637 (1991), aff'd sub nom. National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

<sup>31</sup>*Price Cap Order*, at ¶ 124.

<sup>32</sup>*Id.* at ¶¶ 125, 142.

<sup>33</sup>*Price Cap Order*, at ¶ 142.